Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1994

RUSSELL L. THIBODO, *et al.*,

Petitioners,

vs.

BOARD OF TRUSTEES OF THE CONSTRUCTION LABORERS PENSION TRUST FOR SOUTHERN CALIFORNIA,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Was it an abuse of discretion for the Court of Appeals to find that an attorneys failure to challenge an arbitrators award and stipulated finding on a timely basis is excusable neglect allowing relief from the consequence of the failure to timely challenge the arbitrators award?

2. Pursuant to 29 U.S.C. § 1401(b)(1) and *Trustees of the Amalgamated Insurance Fund v. Sheldon Hall Clothing, Inc.*, 683 F. Supp. 986, 991 (E.D. Pa. 1988), *aff'd*, 862 F.2d 1020 (3d Cir. 1988), is the limitation period for a challenge or modification of the findings of an arbitrator's award thirty days from the date of the issuance of the award.

3. Pursuant to 29 U.S.C. § 1451(f) of the Employment Income Security Act of 1974 (ERISA) as amended by the Multiemployer Pension Plan Amendments Act of 1980 (MPPAA) is the statute of limitations for an action for withdrawal liability under § 1451 limited to three years after the earliest date on which the Respondent acquired or should have acquired actual knowledge of the resumption of covered labor giving rise to the cause of action under that section.

LIST OF PARTIES

The parties to the proceedings are:

Petitioners:	Russell L. Thibodo; Gary R. Thibodo; Thibido Construction Company, Inc. Drainage Construction Company.,
Respondents:	Board of Trustees of the Construction Laborers Pension Trust for Southern California.

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OPINIONS BELOW

The District Court originally dismissed this action brought by the Board of Trustees of the Construction Laborers Pension Trust for Southern California against Petitioner Russell L. Thibodo, Thibodo Construction, *et al.* on August 24, 1992, ruling that a stipulated arbitration finding set forth that the statute of limitations period commenced on June 15, 1983, and pursuant to § 1451 expired on June 15, 1989, such that the Respondent's suit was untimely filed (Appendix C). The court further found that the Board had untimely challenged the arbitrator's findings and stipulated facts, thus dismissing the action. Respondent Board appealed the District Court's decision, and on September 12, 1994, the United States Court of Appeals for the Ninth Circuit reversed the District Court's judgment and dismissal finding that Respondent Board had standing to modify the arbitrator's finding and judgment and was not barred by § 1451, and that the late challenge to the arbitrator's stipulated findings was excusable neglect, thus allowing the motion to be filed late (Appendix B). The opinion was published on September 12, 1994. A Motion for Reconsideration was brought by Petitioner Thibodo, which Motion was denied by the Court of Appeals on October 26, 1994 (Appendix A).

STATEMENT OF JURISDICTION

The Court's jurisdiction to review the post judgment order of the United States Court of Appeals for the Ninth Circuit overturning the District Court's dismissal of the action based on statute of limitations is invoked pursuant to 28 U.S.C. § 1254(1).

The underlying District Court case involved a claim by Respondent Board of Trustees of the Construction Laborers Pension Trust for Southern California (hereinafter "the Plan") to collect withdrawal liability from Petitioners Russell L. Thibodo and Thibodo Construction Company, Inc. (hereinafter

"Thibodo"), under the Employment Income Security Act of 1974 (hereinafter "ERISA"), as amended by the Multiemployer Pension Plan Amendments Act of 1980 ("MPAAA"). The District Court had jurisdiction over the case under 29 U.S.C. § 1451(c) and 28 U.S.C. § 1331. A judgment in Petitioner's favor was entered by the District Court on August 12, 1992 (Appendix C). Respondent filed an appeal with the Ninth Circuit Court of Appeals within thirty days of the District Court's entry of an order denying Respondent's Motion for Reconsideration. Pursuant to Federal Rule of Appellate Procedure 4(a)(4). Petitioner Thibodo timely filed a Notice of Appeal pursuant to Federal Rule of Appellate Procedure 4(a)(3) which requires a party to file a Notice of Appeal within fourteen days after the date on which the first Notice of Appeal was filed. The Court of Appeals reversed the District Court's ruling, apparently finding excusable neglect in Respondent's failure to timely appeal of an arbitration award and judgment, which stipulation established the time periods for statute of limitations purposes, and further found that the statute of limitations period had not run (Appendix B).

Petitioners brought a Motion for Reconsideration based on Federal Rule of Appellate Procedure 40(1), which Motion for Reconsideration was denied on October 26, 1994 (Appendix A). This Petition for Writ of Certiorari is timely filed within ninety days of the denial of the Motion for Reconsideration, October 26, 1994, by January 24, 1995.

STATUTES INVOLVED

29 U.S.C. § 1401(b)(2) provides in pertinent part that:

> (2) Upon completion of the arbitration proceedings in favor of one of the parties, any party thereto may bring an action, no later than 30 days after the issuance of an

> arbitrator's award, in an appropriate United States district court in accordance with section 4301 [29 USCS § 1451] to enforce, vacate, or modify the arbitrator's award.

29 U.S.C. § 1401(c) provides in pertinent part that:

> In any proceeding under Subsection B, there shall be a presumption, rebuttable only by a clear preponderance of the evidence, that the findings of fact made by the arbitrator were correct.

29 U.S.C. § 1451(f) provides that:

> An action under this Section may not be brought after the latter of . . .
>
> (1) Six years after the date on which the cause of action arose, or
>
> (2) Three years after the earliest date on which the plaintiff acquired or should have acquired actual knowledge of the existence of such cause of action; except that in the case of fraud or concealment, such action may be brought not later than six years after the date of discovery of the existence of such cause of action.

STATEMENT OF THE CASE

A. Procedural History

Petitioners Russell L. Thidobo and Thibodo Construction are a construction company which employed union employees

covered under the Employment Income Security Act of 1974 (ERISA).

The underlying District Court case involved a claim by Plaintiff Board of Trustees of the Construction Laborers Pension Trust for Southern California (hereinafter the "Plan") to collect withdrawal liability from Petitioner Thidobo under the Employment Income Security Act of 1974 (hereinafter "ERISA"), as amended the Multiemployer Pension Plan Amendments Act of 1980 ("MPAAA").

B. Course of Proceedings

On June 20, 1989, the Plan filed a Complaint against Thidobo seeking to recover withdrawal liability under the Multiemployer Pension Plan Amendments Act (MPPAA). This dispute was submitted to arbitration under the provisions of the MPPAA and on November 20, 1991, and the arbitrator ruled that a complete withdrawal by Thidobo had occurred on June 15, 1983 (Appendix E). Respondent submitted the Arbitrators Award to the District Court in February, 1992 (Appendix D).

On March 12, 1992, *some 112 days after the arbitrator's award,* the Plan filed a Motion to Enforce the Arbitration Award in total in the United States District Court, Central District. On August 24, 1992, the District Court relying on the *factual stipulation* by counsel for the Plan and the arbitrator's findings, found that the Plan's Complaint had been filed five days too late and was therefor barred by the statute of limitations (Appendix C).

Subsequently, on September 4, 1992, the Plan filed a Motion for Reconsideration for New Trial and/or Amendment of Judgment. Counsel for the Plan, for the first time *and in excess of 310 days after the arbitrator's award,* sought relief from its

factual stipulation made in the arbitration proceeding. Alternatively the Plan sought to have the Court reconsider its decision to deny the Plan's Motion based on an admitted error by counsel for the Plan in its stipulations before the Arbitrator. The Court on December 4, 1992, again denied relief based on the application for relief being untimely and time-barred.

Petitioner Thidobo then filed an Application for Attorney's Fees and Litigation Expenses pursuant to 29 U.S.C. § 1451(e). By order dated December 8, 1992, the District Court denied the Plan's Motion for Reconsideration and also denied Thidobo's Application for Fees and Expenses.

Consequently on June 4, 1993, the Plan filed a Notice of Appeal of the District Court's ruling. Pursuant to FRAP 4(a)(3) Thidobo on January 12, 1993 filed its Notice of Appeal of the Court's denial of Thidobo's Application for Fees.

On September 12, 1994 the Court of Appeals reversed the District Court's dismissal and remanded the action to the District Court.

C. Statement of Facts

Withdrawal liability under ERISA is an employer's share of a plan's unfunded vested benefits, *i.e.*, the amount by which the present value of a plan's vested benefits exceeds current plan assets. *Pension Benefit Guaranty Corporation v. B.A. Gray Co.*, 467 U.S. 717, 725, 104 S. Ct. 2709, 2715, 81 L. Ed. 2d 601 (1984). This is the price that Congress requires a withdrawing employer to pay a plan as a condition for the release from a continuing obligation to make payments to a multiemployer plan. *H.C. Elliott, Inc. v. Carpenters Pension Trust Fund for Northern California,* 859 F.2d 808, 814 (9th Cir.), *cert. denied,* 493 U.S. 812, 110 S. Ct. 57 (1989).

Respondent Construction Laborers Pension Trust for Southern California (the "Plan" or the "plan") is a pension plan in the construction industry to which withdrawing construction industry employers such as Petitioner Thibodo Construction Company ("Thibodo") owe withdrawal liability if such employers withdraw from the plan. Thibodo Construction Co., Inc. ("Thibodo") is an employer that previously contributed to the plan in 1976-81. To withdraw and incur withdrawal liability, an employer must (1) cease to have an obligation to contribute under the plan, and (2) either (a) continue to perform work in the jurisdiction of the collective bargaining agreement of the type for which contributions were previously required or (b) resume such work within five years after the date on which the obligation to contribute under the plan ceases, without renewing the obligation to contribute at the time of resumption. 29 U.S.C. § 1383(b)(2).

In 1976, Thibodo signed a collective bargaining agreement with the Southern California District Council of Laborers (the "Union") which required, among other things, that Thibodo contribute to the plan for pensions for Thibodo's laborer employees. In 1980, Thibodo executed a second collective bargaining agreement with the Union also requiring contributions to the plan. The latter agreement expired on June 15, 1983.

In *January of 1983, Thibodo notified the Union by letter that Thibodo intended to terminate its collective bargaining agreement with the Union as of June 15, 1983*, wherein Thibodo offered to meet and confer with the Union for purpose of negotiating a new collective bargaining agreement.

After Thibodo's collective bargaining agreement expired, in July 1983, the Union's attorneys wrote to Thibodo's attorneys and offered to negotiate a new collective bargaining agreement. Thibodo's attorneys responded to this letter that it has been over

two years since Thibodo had done any work within the jurisdiction of the Union, that Thibodo did not employ any members of the Union, that the agreement between Thibodo and the Union had been a pre-hire agreement that had been cancelled as of June 15, 1983, and that a collective bargaining agreement relationship between Thibodo and the Union no longer existed, and that negotiations for a new agreement were no longer necessary or appropriate. As such, its obligation to contribute to the plan ceased on June 15, 1983.

By letter dated February 13, 1984, the plan notified Thibodo that the plan records indicated that Thibodo had not contributed to the plan since August of 1981 and that because Thibodo had not signed a renewal of a collective bargaining agreement obligating Thibodo to contribute to the plan that the plan had concluded that Thibodo had chosen to withdraw from the plan, hereafter, "the 1984 withdrawal liability assessment".

In the spring of 1985, Thibodo resumed work on projects for the Riverside County Flood Control District and the Yucaipa Valley Water District.

Upon information that Thibodo was again directly employing laborers within the jurisdiction of the plan, on July 10, 1985, the plan notified Thibodo by letter that the plan was reinstating Thibodo's withdrawal liability.

Thibodo made no payment with respect to the 1985 withdrawal liability assessment and by letter dated September 12, 1985 the plan notified Thibodo that Thibodo was delinquent in its payments and that if Thibodo did not cure the delinquency within 60 days, Thibodo would be in default and the plan could declare Thibodo's entire withdrawal liability immediately due. *From September 12, 1985 to April 6, 1989, there was no communication between Thibodo and the plan.*

In April 1989, by letter the Plan notified Thibodo that the plan was terminating the agreement with respect to Thibodo's withdrawal liability and that Thibodo must commence payment of withdrawal liability within 60 days.

On June 20, 1989, the plan filed suit in the United States District for the Central District of California against Thibido, Russell Thibodo, Gary Thibodo, G.R. Thibodo Construction and Drainage Construction Co., Inc. to collect withdrawal liability.

In October 1990, the plan agreed to stay its District Court proceedings while the parties arbitrated (1) whether the plan had correctly determined the year of Thibodo's 1983, withdrawal complete and (2) whether Russell Thibodo was personally liable for the withdrawal liability of Thibodo. The parties *stipulated* to the facts referenced above (Appendix D).

The arbitration was tried upon a stipulated statement of facts. The depositions of Russell Thibodo and of the plan's withdrawal liability coordinator and exhibits were admitted into evidence. In the arbitration, the plan argued that Thibodo's date of withdrawal was in 1983; Thibodo contended its date of withdrawal was in 1985 when Thibodo resumed covered work within the jurisdiction of the plan. The arbitrator ruled that the plan had "correctly determined [Thibodo] completely withdrew from the plan in 1983 and that Russell Thibodo was personally liable for the withdrawal liability of Thibodo." (Appendix E).

As stated, the arbitration as to the Petitioner's withdrawal from the Plan was arbitrated on a *stipulated* statement of facts. The stipulation of facts included the statement that the collective bargaining agreement which is the subject of this action *expired on June 15, 1983.* Neither party called any witnesses, although the deposition of Russell Thibodo and the Plan's withdrawal

liability coordinator and exhibits were admitted into evidence. As stated, in November of 1991, the arbitrator determined that the Company's withdrawal from the Plan *occurred on June 15, 1983.*

In particular, the arbitrator stated:

> the arbitrator takes the date up to termination of the bargaining agreement between the parties as the date of the withdrawal from the PLAN, which is June 15, 1983. THIBODO had notified the UNION that he intended to terminate his collective bargaining agreement with the UNION as of June 15, 1983. This, it would seem, would be a logical date for the withdrawal from the pension plan. It is the decision of the arbitrator that the Board of Trustees of the Construction Laborers Pension Trust for Southern California correctly determined that THIBODO CONSTRUCTION COMPANY, INC., completely withdrew from the Plan in 1983 and that RUSSELL L. THIBODO is individually liable for withdrawal liability of THIBODO CONSTRUCTION COMPANY, INC. and that therefore, withdrawal liability should bear legal interest from June 15, 1983 [Appendix E].

On December 2, 1991, the Plan filed a Notice of Lodging and lodged a copy of the Arbitrator's Opinion and Award with the District Court. [Appendix E]

On March 12, 1992, 112 days after the award, the Plan filed a Motion to Enforce the Arbitration Award in its entirety. The Plan

did not attack any portion of the Arbitrator's Findings.[1]

Petitioner Thibodo opposed the Motion, asserting among other things that under the Arbitrator's Decision, Thibodo had completely withdrawn from the Plan on June 15, 1983 and that the Plan's action was thus barred by the statute of limitations. After very extensive briefing by both parties, the District Court denied the Plan's Motion to Enforce the Arbitration Award. The District Court concluded that complete withdrawal occurred on June 15, 1983, and ruled that the Plan's action was therefore barred by the statute of limitations (Appendix C). The court noted that the Arbitrator's Factual Finding was based on the Plan's factual stipulation concerning the date of withdrawal — June 15, 1983. The Plan unsuccessfully sought reconsideration of the order denying confirmation of the Arbitrator's Award, and for the first time requested relief from its own factual stipulation, which the court denied.

REASONS FOR GRANTING THE WRIT

SUMMARY

The decision below presents an important unanswered question and conflicts with Supreme Court and statutory law. A conflict exists between the districts on this issue in that it is an abuse of discretion for a lower court to find that a mistake of law regarding the timely filing of a challenge to an arbitrator's award constitutes excusable neglect for which relief can be granted. Further, the limitation for challenging or modifying the findings of an arbitrator's award is thirty days from the date of the issuance

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1. In fact, in his Declaration in Support of the Plan's motion to enforce the award, counsel offered a "true copy of the Arbitrator's Opinion and Award, where the arbitrator found that the Plan had correctly determined the date of Thibodo's withdrawal."

of the award. Finally, the limitations period for filing a lawsuit for withdrawal liability under ERISA is three years from actual or constructive knowledge of the resumption of covered labor which gives rise to the cause of action under this section, which was not met in this action.

I.

RESPONDENT'S FAILURE TO TIMELY CHALLENGE THE ARBITRATOR'S FINDINGS CANNOT BE WAIVED OR FOUND TO BE EXCUSABLE NEGLECT.

Respondent Plan's failing to object to the arbitrator's findings in an timely manner was a mistake of law and *inexcusable* neglect pursuant to 29 U.S.C. § 1401(b)(2) any challenge to the finding of an arbitrator's award *must be made within thirty days from the date of the issuance* of the award, or any objections thereto are forever waived. Under clear case law, a court abuses its discretion by finding that a mistake of law such as the untimely filing of a post trial motion is "excusable" under Federal Rule of Appellate Procedure 6(b). *Kyle v. Campbell Soup Company,* 28 F.3d 928 (1994). The *Kyle* court ruled that an attorney's error in failing to timely file proposed trial motions are *not* excusable neglect and cannot in fact be excused, such that the failure to meet such time standards may not be waived and thus bar relief from the untimely appealed act.

Indeed, courts have consistently held that parties are to be bound by factual stipulations unless timely relief is sought. In the instant matter, the Plan is guilty of a gross failure to timely seek relief.

A further case on point is *In re Royster Co.*, 132 Bankr. 684 (1991). In the *Royster* action, counsel erred when agreeing to a written stipulation. On April 8, 1991 Royster Co., Royster

Midatlantic Company and RK Agri Services, Inc. (hereinafter collectively "Royster") filed for reorganization under Chapter 11. Royster, owned and operated a terminal in Florida which it used for storing and handling materials for area manufacturing facilities. Royster had an agreement CTI, a 50% subsidiary of Royster, to store the ammonia at the Tampa terminal.

On April 11, 1991 CTI filed a petition for Chapter 11 reorganization. Upon filing of the CTI petition it was discovered that there were competing claims to the ammonia.

During a hearing, the parties entered into a stipulated order providing for escrow proceeds of the sale of the ammonia. In the stipulation, the parties authorized Royster to purchase all or part of the ammonia and authorized CTI to sell the ammonia to Royster for a price of $123.12 per metric ton.

Shortly after the stipulation was signed by all the parties and so ordered by the court, one of the parties made a motion to have the stipulation *amended* so that the price would read $123.12 per short ton instead of $123.12 per metric ton (one short ton = 2,000 pounds per ton, 1 metric ton = 2,200 pounds per ton). The effect of this change would be a higher price per ton than specified in the stipulation.

Said party claimed its counsel erred in agreeing to the stipulation. Thereafter, it sought to amend the price through a motion for modification of the stipulation and order. One of the arguments that said party made was that the court must modify the stipulation on the basis of fairness under Rule 60(b)(1) of the Federal Rules of Civil Procedure as applied pursuant to Bankruptcy Rule 9024, which provides that "on motion and upon such terms as are just," the court may relieve a party or its legal representative from a final judgment or order on the grounds of mistake.

The court *refused* to grant the party's motion for modification of the stipulation and order. The court stated:

> Courts have held that a party seeking Rule 60(b)(1) relief from a stipulation must meet a very heavy burden of proof. Nemaizer v. Baker, 793 F.2d 58, 63 (2d Cir. 1986). Generally this burden is only met upon the clear showing of a grievous wrong that has resulted from unforeseen conditions. *See* generally *United States v. Swift & Co.*, 286 U.S. 106, (1932). Additionally, courts have held that *neither ignorance nor carelessness on the part of an attorney* will provide grounds for Rule 60(b)(1) relief. *Hoffman v. Celebrezze*, 405 F.2d 833 (8th Cir. 1969). In the instant case, there is no showing of a grievous wrong and there are no unforeseen conditions. In addition, Gemini's alleged allegation of mistake is based entirely on the claim that its attorney had a faulty memory. Thus, modification of the stipulation and order under Rule 60(b)(1) is inappropriate.

Royster, 132 Bankr. at 687 (emphasis added).

In *Nemaizer v. Baker*, 793 F.2d 58, 63 (2d Cir. 1986), Plaintiff commenced an action in the New York state court to recover employee benefit trust fund contributions from appellant, Jack Baker (hereinafter "Baker"), an officer of Sue Brett, Inc. Sue Brett, Inc., the corporate employer, had declared bankruptcy, and the complaint alleged that Baker was personally liable for the delinquent contributions as the corporation's chief operating officer.

Baker removed the action to the United States District Court for the Southern District of New York. Subsequently, Baker moved the federal court to dismiss the complaint because the complaint was preempted by ERISA and ERISA did not impose liability upon a non-signatory to a collective bargaining agreement regardless of the individuals corporate status.

During the pendency of the motion, the New York Court of Appeals decided a case which held that New York Labor Law § 198-c did not provide a cause of action for recovery of unpaid employee benefit trust funds against an individual. Based with this knowledge, Nemaizer *agreed to stipulate* to dismissing the action "with prejudice" and it was "so ordered" by the court.

Six months later Plaintiff Nemaizer brought an action in federal court alleging that Baker was liable under ERISA for contributions owed the fund by the corporation. The federal court judge the case was assigned to indicated that he would dismiss the case based on res judicata unless Nemaizer convinced the judge who ordered the dismissal "with prejudice" to encompass only the state law claim. The Plaintiff made a FRCP 60(b) motion to accomplish this and the court granted this motion. Baker appealed the result.

The United States Court of Appeals, Scond Circuit reversed the judgement appealed from and dismissed Nemaizer's ERISA claim as barred by *res judicata*.

The court addressed FRCP 60(b)(1) which allows the court "to relieve a party from a final judgement, order, or proceeding for . . . mistake, inadvertence, surprise, or excusable neglect." Plaintiff contended that his counsel in the original action did not contemplate the breadth of the stipulation and did not thereby intend to foreclose later bringing an ERISA claim.

The court responded:

> we have consistently declined to relieve a client under subsection (1) of the 'burdens of a final judgement entered against him due to the mistake or omission of his attorney by reason of the latter's ignorance of the law or other rules of the court, or his inability to efficiently manage his caseload.' *United States v. Cirami,* 535 F.2d 736, 739 (2d Cir. 1979); *United States v. Erdoss*, 440 F.2d 1221 (2d Cir.); *Horvath v. United States,* 404 U.S. 849 (1971); *Schwarz v. United States,* 384 F.2d 833 (2d Cir. 1967) ... mere dissatisfaction in hindsight with choices deliberately made by counsel is not grounds for finding the mistake, inadvertence, surprise or excusable neglect necessary to justify 60(b)(1) relief *See United States v. O'Neil,* 709 F.2d 361, 373 (5th Cir. 1983); *Chick Kam Choo v. Exxon Corp.,* 699 F.2d 693, 695 (5th Cir.); *Chick Kam Choo v. Esso Oil Co.,* 464 U.S. 826 (1983) ... More importantly ... an attorney's failure to evaluate carefully the legal consequences of a chosen course of action provides no basis for relief from a judgement. *See United States v. O'Neil,* 709 F.2d 361, 373 (5th Cir. 1983); *Chick Kam Choo,* 699 F.2d at 696-97.

Id. at 62.

The Court addressed FRCP 60(b)(6) which allows the court "to grant relief for any reason justifying relief from the operation of the judgement." The court noted that "this portion of the rule is

properly invoked only when there are extraordinary circumstances justifying relief, when the judgement may work an extreme and undue hardship." *Id.* at 63. The court held that this section clearly did not apply to this case.

In these cases, it is clear that an attorney can not be relieved of his mistake of law in failing to timely object to a stipulated findings, and that parties are to be bound by their factual stipulations *unless timely relief is sought*. As stated, in the instant matter, the Plan failed to timely seek relief, and cannot be relieved of its error.

II.

THE PLAN HAS WAIVED ITS RIGHT TO OBJECT TO AND/OR MODIFY THE FACTUAL FINDINGS OF THE ARBITRATOR.

A. An Arbitrator's factual findings are presumed correct.

In determining the scope of review, there is a presumption that the findings of fact made by the arbitrator are correct. 29 U.S.C. § 1401(c) provides that "[i]n any proceeding under subsection (b), there shall be a presumption, rebuttable only by a clear preponderance of the evidence, that the findings of fact made by the arbitrator were correct." Factual findings of the arbitrator are presumed correct, but the court *may* review de novo all conclusions of law. *Trustees of Amalgamated Insurance Fund v. Geltman Industries, Inc.*, 784 F.2d 926, 929 (9th Cir. 1986), *see also, Borden, Inc. v. Bakery and Confectionery Union and Industry International Pension Fund, et al.*, 14 E.B.C. 1581 (1991). However, a District Court is not given plenary review over the arbitrator's findings of law because it is the long established policy of the courts to grant extreme deference to the arbitrator's legal determinations. *United Retail & Wholesale*

Employees Teamster Union Local No. 115 Pension Plan v. Yahn & McDonnell, Inc., 787 F.2d 128 (3rd Cir. 1986).

B. Any act to object to and/or modify the factual findings of the Arbitrator is time-barred by 29 U.S.C. § 1401(b)(2).

Any act to object or modify factual findings of an arbitrator is governed by 29 U.S.C. § 1401(b)(2). In the instant action the Plan has attempted to obtain relief from its own factual stipulations, entered into during the arbitration of this matter in 1991. The Plan, for the first time sought relief from the factual findings of the Arbitrator in its request for consideration filed before the District Court on or about September 4, 1992, in excess of 310 days after the issuance of the Arbitrator's award.

The District Court correctly determined that the Plan's complaint for alleged funds due was barred by the applicable six year statute of limitations, and hence denied the Plan's Motion to Enforce the Arbitration Award. Additionally, the District Court correctly denied the Plan's Motion for Reconsideration, wherein it sought relief, for the first time, from its errors associated with its factual stipulation, because the Plan could not establish proper grounds for reconsideration, nor a timely request for relief from the Arbitrator's findings.

Pursuant to 29 U.S.C. § 1401(b)(2), challenges to the findings of an Arbitrator's award must be made within thirty days from the date of the issuance of the award, or any objections thereto are forever waived. *Trustees of the Amalgamated Insurance Fund v. Sheldon Hall Clothing, Inc.*, 683 F. Supp. 986, 991 (E.D. Pa. 1988), *aff'd*, 862 F.2d 1020 (3rd Cir. 1988).

It is undisputed that the Plan failed to seek timely relief from the findings of the Arbitrators, as set forth by 29 U.S.C. § 1401(b)(2), the District Court was without power to alter and/or

modify the Arbitrator's findings. Accordingly, the District Court correctly determined, based upon the Arbitrator's factual findings, that any objections to the Arbitrator's findings have been waived by the Plans and cannot be reversed. Thus, the Plan's action was barred by the applicable six year statute of limitations. Since the record is entirely devoid of any evidence to establish that the District Court's ruling was clearly erroneous, it is clear that Defendant's Appeal lacks merit and must be denied.

In an effort to evade the judicial deference of the federal court system to an Arbitrator's findings, as well as the provisions of 29 U.S.C. 1401(b)(2) restricting the ability to modify an Arbitrator's award after a proscribed period of time, the Plan nonetheless sought to "dance" around these consequences by asserting that the Arbitrator's holding was based on an incorrect finding of law. This is clearly contrary to the state of the record which establishes that the District Court's ruling was based on the factual findings which had been adopted by the Arbitrator and which the Court was without authority to alter or modify thereafter.

However, the Court of Appeals reversal allowed the Plan to circumvent the dictates of 29 U.S.C. § 1401(b)(2) and evade the consequences of its own failure to timely act. As the record demonstrates, the Arbitrator's award was issued in November of 1991. On December 2, 1991, the Plan filed a notice of lodging and lodged a copy of the Arbitrator's opinion and award with the District Court. Thereafter, on March 12, 1992, some 112 days after the Arbitrator's award, the Plan sought to enforce the award of the Arbitrator entirely, and, in fact, offered a "true copy of the Arbitrator's Opinion and Award, where the Arbitrator found that the Plan had correctly determined the date of Thibodo's withdrawal."[2]

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2. *See* Footnote 1.

As the record makes clear, as of December 2, 1991, and again as of March 12, 1992, the Plan had adopted the Arbitrator's finding in total including the Arbitrator's determination that the withdrawal occurred on June 15, 1983 (Appendix D and E). For unexplained reasons, the Plan simply failed to recognize the error implicit in its factual stipulation during the arbitration and the logical effect on the statute of limitation issue raised by Thibodo. It was not until September of 1992, a period in excess of 310 days after the rendering of the Arbitration award that relief from the alleged erroneous stipulation was sought for the first time. It must be noted that the application for relief, was only as a result of the District Court's denial of the Plan's Motion to Enforce the Arbitration Award. Clearly, up until that point in time, counsel for the Plan had failed to recognize the errors implicit in his factual stipulation.

Because the Plan was unable to offer a legally acceptable excuse for its failure to timely act in regards to the alleged erroneous stipulation, and because the request for relief did not state legally adequate grounds for reconsideration, the District Court properly denied the relief requested. The District Court's action was correct based upon the facts of the case and the procedural history at that time. The court's decision denying relief cannot, as a matter of law, be found to be "clearly erroneous." To the contrary, the dilemma the Plan finds itself faced with in the instant situation is a direct result of its own errors and its own failure to timely act to seek relief from these errors.

III.

THE PLAN SHOULD HAVE MADE A MOTION TO VACATE OR MODIFY THE ARBITRATOR'S AWARD IF IT DID NOT AGREE WITH THE OPINION OR AWARD.

Pursuant to 29 U.S.C. § 1401(b)(2):

> Upon completion of the arbitrator's proceeding in favor of one of the parties, *no later than thirty days after the issuance of the arbitrator's award* in an appropriate United States District Court . . . to *enforce, vacate,* or modify the arbitrator's award.

(Emphasis added).

In the instant case, the Plan freely and voluntarily stipulated to the date of June 15, 1983, as the expiration date of the collective bargaining agreement between the Plan and Thibodo. This date was subsequently adopted by both the arbitrator and the District Court as the withdrawal date for Thibodo.[3] *The Plan after receiving the Opinion and Award of the Arbitrator chose to enforce the award as opposed to modifying or vacating it.* It was

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3. Initially it was contended by Thibodo that its obligation to contribute to the Plan ceased on June 15, 1983; whereas the Plan contended that Thibodo ceased to have any further obligation to contribute to the plan effective August 1, 1983. Subsequently the Arbitrator stated in his Opinion and Award that "the Arbitrator takes the date of termination of the bargaining arrangement between the parties as the date for withdrawal from the Plan, which is June 15, 1983." There was no finding of fact that Thibodo ceased to have any further obligation to contribute to the plan effective August 1, 1983 or that Thibodo's obligation for payment accrued as of the date of demand. Instead, the Plan accepted June 15, 1983 as the date of termination, date of withdrawal, and date for accrual of interest on the unpaid contributions. It was then held by the District Court that complete withdrawal by Thibodo occurred on June 15, 1983.

only after the Plan realized that they would be barred by the statute of limitations based on the dates upon which they had stipulated to, the Arbitrator had adopted, and the Plan had sought to enforce, that the Plan claimed that error had been committed. However, the time within which the Plan had to act to be relived of any such error has long since expired. It is simply too late for the Plan to rewrite, add to, or modify the findings of the Arbitrator.

IV.

THE PLAN HAS NOT FILED ITS ACTION WITHIN THE STATUTE OF LIMITATIONS PERIOD OF § 1451(f)(2).

29 U.S.C. §1451(f) provides that:

> An action under this section may not be brought after the later of —
>
> (1) 6 years after the date on which the cause ofof action arose, or
>
> (2) 3 years after the earliest date on which the plaintiff acquired or should have acquired actual knowledge of the existence of such cause of action; except that in the case of fraud or concealment, such action may be brought not later than 6 years after the date of discovery of the existence of such cause of action.

In the decision by the District Court, the Court at page 10975 reviewed in detail and found that the Plan was aware of the amount of the assessment as early as July, 1984 but agreed that the assessment was erroneous because the company had not

employed laborers since the expiration of its Collective Bargaining Agreement (CBA) with the Union, (*see* 29 U.S.C. § 1383(b)(2)(B)), and that it became aware in the Spring of 1985 that the company resumed hiring of laborers and that the Plan *became aware of the resumption of labor by Thibodo* and reinstated the withdrawal liability assessment in the Spring of 1985, and that it made demand for payment in April 1986. Finally, the court acknowledged the initiation of the lawsuit on June 20, 1989.

As such, the Court failed to properly review the above facts in light of § 1451(f)(2) and the applicable *three year statute of limitations* contained therein.

If, in fact, in that the Court found that the statute of limitations period begins to run from the date the Plan became *aware* of Thibodo's resumed work, then the court was required to but failed to acknowledge the application of § 1451(f)(2), which provided a limitations period of three years *from actual knowledge*. When so viewed, it is apparent that the Plan knew that Thibodo had resumed operations in the Spring of 1985, yet did not file suit until June 20, 1989, some four (4) years after obtaining knowledge of Thibodo's resumption of work.

The intent of § 1451(f)(2) requires on its face and by its express terms that the statute begins to run upon the Plan's acquiring of knowledge of Thibodo's resumption of work in the Spring of 1985. It is clear that the Plan acquired knowledge in 1985, an did not file its suit until 1989, such that it has not met the three (3) year limitation period. The Court of Appeals did not address this issue, such that their reversal of the District Court dismissal was error.

CONCLUSION

The District Court's actions in denying the Plan's Motion to Enforce the Arbitration Award and the subsequent denial of the Plan's request for reconsideration were proper. The record before the Court established that the time within which the Plan could seek to modify, alter or vacate the Arbitrator's award, including the alleged erroneous stipulation, had long since expired, and it has failed to timely challenge the findings and is now barred from doing so. Accordingly, the Plan is without recourse to now argue that the Arbitrator's findings should be disregarded based upon a claim of error. The failure of Petitioner to timely challenge the award cannot be found to be excusable neglect. Accordingly, the District Court's rulings cannot be found to be "clearly erroneous", and the appellate court erred in so ruling.

In light of the District Court's decision that the statute of limitations period runs from the date the Respondent became aware of the company resuming work of the type for which contributions were previously required § 1451(f)(2) clearly provides that the three year statute of limitations applies in this case and the statute period runs from three years from the date the Plan became aware of resumption of work. Clearly, the Plan knew that Petitioner Thibodo resumed work in the Spring of 1985 and did not file the instant action until June 20, 1989, over four years after the Plan had actual knowledge that Thibodo resumed work.

As such, even if the Respondent was not barred from relief from the factual stipulations which it did not timely object or bring a motion to challenge, based on its actual knowledge of withdrawal liability, it is not timely filed this action. As such, the Court of Appeals reversal and remand of the District Court's decision dismissing this action is improper and this Petitioner respectfully requests it be reversed.

Respectfully submitted,

RICHARD B. ANDRADE
Counsel of Record
ANDRADE, FLEMING & MUZI
Attorneys for Petitioners Thibodo Construction Company, Inc. and Russell L. Thibodo
18401 Von Karman Avenue
Suite 350
Irvine, California 92715
(714) 553-1951

DATED: January 24, 1995

APPENDIX A — NINTH CIRCUIT COURT OF APPEALS ORDER DENYING PETITION FOR REHEARING FILED OCTOBER 26, 1994

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. CA 93-55079
No. DC CV-89-03719-JMI

BOARD OF TRUSTEES OF THE CONSTRUCTION LABORERS PENSION TRUST FOR SOUTHERN CALIFORNIA,

Plaintiff-Appellant,

v

RUSSELL L. THIBODO; GARY R. THIBODO; THIBODO CONSTRUCTION CO. INC.; DRAINAGE CONSTRUCTION CO.

Defendants-Appellees.

No. CA 93-55080
No. DC CV-89-03719-JMI (G

BOARD OF TRUSTEES OF THE CONSTRUCTION LABORERS PENSION TRUST FOR SOUTHERN CALIFORNIA,

Plaintiff-Appellant/Appellee,

v

Appendix A

RUSSELL L. THIBODO; THIBODO CONSTRUCTION CO. INC.,

Defendants-Appellees/Appellant

ORDER

BEFORE: FLETCHER, CANBY & HALL, CIRCUIT JUDGES.

The petition for rehearing is denied.

APPENDIX B — NINTH CIRCUIT COURT OF APPEALS OPINION AND ORDER REVERSING AND REMANDING DISTRICT COURT JUDGMENT FILED SEPTEMBER 12, 1994

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 93-55079

D.C. No.
CV-89-03719-JMI

BOARD OF TRUSTEES OF THE CONSTRUCTION LABORERS PENSION TRUST FOR SOUTHERN CALIFORNIA,

Plaintiff-Appellant,

v.

RUSSELL L. THIBODO; GARY R. THIBODO; THIBODO CONSTRUCTION CO. INC.; DRAINAGE CONSTRUCTION CO.,

Defendants-Appellees.

No. 93-55080

D.C. No.
CV-89-03719-JMI

BOARD OF TRUSTEES OF THE CONSTRUCTION

Appendix B

LABORERS PENSION TRUST FOR SOUTHERN CALIFORNIA,

Plaintiff-Appellant-Appellee,

v.

RUSSELL L. THIBODO; THIBODO CONSTRUCTION CO. INC.,

Defendants-Appellees-Appellants.

OPINION

Appeals from the United States District Court
for the Central District of California
James M. Ideman, District Judge, Presiding

Argued and Submitted
June 8, 1994—Pasadena, California

Filed September 12,1994

Before: Betty B. Fletcher, William C. Canby, Jr., and Cynthia Holcomb Hall, Circuit Judges.

Opinion by Judge Canby

* * *

COUNSEL

John S. Miller, Jr. Cox, Castle & Nicholson, Los Angeles, California, for the plaintiff-appellant-appellee.

Appendix B

Andrew C. Muzi, Andrade & Associates, Irvine, California, for the defendants-appellees-appellants.

OPINION

CANBY, Circuit Judge:

The Board of Trustees of the Construction Laborers' Pension Trust for Southern California appeals the district court's dismissal of this action in which the Trustees sought to enforce an arbitration award. The arbitrator had determined that Russell Thibodo was personally liable to the Trust for ERISA withdrawal liability incurred as a result of his construction company's complete withdrawal from the Construction Laborers Pension Plan in 1983. The district court, however, held that the Trustees' action was barred by ERISA's six-year statute of limitations.

We reverse and remand the district court.[1]

STATUTORY BACKGROUND

ERISA, as modified by the Multiemployer Pension Plan Amendments Act of 1980 (MPPAA), is designed to ensure the financial integrity of multiemployer pension funds. *See generally Joyce v. Clyde Sandoz Masonry,* 871 F.2d 1119 (D.C. Cir.), *cert. denied,* 493 U.S. 918 (1989). One mechanism for attaining this goal is the Act's requirement that employers who withdraw from multiemployer plans remain liable for a statutory share of the plan's "unfunded vested benefits." *See* 29 U.S.C. §§ 1381, 1399; *Joyce,* 871 F.2d at 1120.

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1. Thibodo cross-appeals the district court's denial of his motion for attorneys' fees. In light of our disposition, we dismiss the cross-appeal as moot.

Appendix B

Much of the confusion surrounding this case is due to the fact that, at least with regard to the construction industry, when "complete withdrawal" occurs is determined differently under two different sections. The first determination under 29 U.S.C. § 1383(b)(2) is for the purpose of establishing whether the employer has, in fact, withdrawn and liability for continuing contributions has ended. The second determination is for the purpose of establishing the amount of withdrawal liability. The former determination is made under sections 1383(b)(2)(A) and (B). An employer is deemed to have completely withdrawn from the plan if:

> (A) [the] employer ceases to have an obligation to contribute under the plan, and
>
> (B) the employer
>
> > (i) continues to perform work in the jurisdiction of the collective bargaining agreement of the type for which contributions were previously required, or
> >
> > (ii) resumes such work within 5 years after the date on which the obligation to contribute under the plan ceases, and does not renew the obligation at the time of the resumption.

29 U.S.C. §§ 1383(b)(2)(A), (B). It may readily be seen that conditions (A) and (B) may not be met for up to 5 years after an employer's duty to make regular contributions to the fund has ceased. Indeed, as we will see, the employer in the present case did not effectuate "complete withdrawal" until two years after it ceased contributions to the plan.

Different statutory provisions, however, determine the "date of complete withdrawal" for purposes of calculating the amount of withdrawal liability. For that purpose, the date of "complete withdrawal" is deemed to be the "date of the cessation of the obligation to contribute." 29 U.S.C. § 1383(e). This date, or, more accurately, the year in which this date falls, is instrumental in determining the amount of the employer's withdrawal liability. *See* 29 U.S.C. § 1391(b)(2) (amount of unfunded vested benefits that existed on the last date of the plan year preceding the year in which the employer withdrew is the amount for which the employer owes a contribution).

Civil actions to collect unpaid withdrawal liability amounts may not be brought after the later of: (1) six years after the date on which the cause of action arose; or (2) three years after the earliest date on which the plaintiff acquired or should have acquired actual knowledge of the existence of such cause of action, with one exception not relevant to this case. *See* 29 U.S.C. § 1451(f).

FACTUAL BACKGROUND

The Trust is the plan sponsor for the Construction Laborers Pension Plan (the Plan). Thibodo Construction Co., Inc. contributed to the Plan pursuant to its collective bargaining agreement (CBA) with the Laborers Union until June 15, 1983, the date upon which the CBA expired. In early 1984, the Trustees believed that the company had withdrawn from the Plan and therefore owed withdrawal liability as provided in ERISA under the MPPAA. They sent the company an assessment notification and payment schedule. The company disputed the assessment, however, and in July 1984 the Trustees agreed that the assessment was erroneous because the company had not employed any laborers since the expiration of its CBA with the union. *See* 29

U.S.C. § 1383(b)(2)(B). The Trustees warned, however, that the company would owe withdrawal liability if it resumed hiring laborers.

In the Spring of 1985, the company resumed hiring laborers to perform work within the jurisdiction of the Plan. When the Trustees became aware of this resumption, they reinstated the company's withdrawal liability assessment, but the company made no payments to the Plan in response to the assessment. Nothing more transpired until April 1986, when the Trustees notified the company that it must begin making payments on the assessment within 60 days. Having received no payments from the company, the Trustees initiated this lawsuit in the district court on June 20, 1989, six years and five days after the expiration of the company's CBA.

The district court agreed to stay its proceedings so that the parties could submit the following issues for arbitration: (1) whether the company had completely withdrawn from the plan in 1983; and (2) whether Thibodo, the company's sole shareholder, was personally and individually liable for the company's withdrawal liability. The arbitrator concluded that the company had withdrawn from the plan on June 15, 1983,[2] and that Thibodo

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2. The Trustees dispute this determination by arguing that Thibodo had a legal obligation to continue payments to the plan for a short time beyond the CBA's expiration on June 15, 1983. *See* 29 U.S.C. § 1383(e) (date of complete withdrawal is the date that the employer ceased to have an obligation to contribute to the plan). Thus, they argue, the "date of complete withdrawal" was later than June 20, 1983. If this argument were accepted, then the Trustees' action would be timely regardless of whether the limitations period began to run on the "date of complete withdrawal" as defined in § 1383(e).

We need not address the question of when Thibodo's obligation to contribute

(Cont'd)

was personally liable for the company s withdrawal liability.[3]

After the arbitrator's decision, the Trustees moved the district court to enforce the arbitration award. In opposition, Thibodo asserted that the Trustees' district court action had been filed beyond the limitations period provided in ERISA. The district court agreed with Thibodo and dismissed the action.

DISCUSSION

We must decide when the statute of limitations begins to run for actions to recover withdrawal liability payments under ERISA and the MPPAA. We hold that, for actions to recover withdrawal liability incurred as a result of complete withdrawal under 29 U.S.C. § 1383(b), the limitations period begins to run from the date that the conditions for withdrawal specified under that section are met. In this case, that date fell sometime in the Spring of 1985, when the company resumed work of the type for which contributions were previously required.

The district court concluded that the limitations period began running on June 15, 1983, which the arbitrator determined to be the "date of complete withdrawal" as defined in § 1383(e).[4]

(Cont'd)
ceased because we conclude that the limitations period does not run from the date of complete withdrawal as defined in § 1383(e). For the same reason we need not address the parties' contentions pertaining to: (1) whether the arbitrator improperly decided an issue not before it when it determined an exact date on which Thibodo withdrew; and (2) whether the district court should have deferred to the arbitrator's determination of the date of complete withdrawal.

3. We express no opinion regarding the correctness of this determination.

4. We note that Thibodo has been unable to cite to any federal court opinion in (Cont'd)

We repudiate that conclusion because, under the district court's approach, the limitations period was running against the Trustees before they acquired a cause of action against Thibodo. For purposes of limitations, Thibodo's complete withdrawal from the Plan occurred in the Spring of 1985 when his company resumed employing laborers, because only then were the statutory conditions for complete withdrawal met. 29 U.S.C. § 1383(b)(2). Before that time, the Trustees had no right to assess or receive withdrawal liability payments from Thibodo. Indeed, the Trustees realized as much in 1984 when they withdrew their original assessment. It is anomalous to conclude that the limitations period of § 1451(f) was running against the Trustees before they had a right to sue.

For the purpose of calculating the amount of withdrawal liability under § 1391, it is useful to fix the "date of complete withdrawal" as the date when the duty of regular contribution ceased. *See* 29 U.S.C. § 1383(e); *Joyce,* 871 F.2d at 1123. But in the case of a withdrawal in the construction industry, selection of such a date may involve a considerable period of relation back, as it does in the present case. The fact that it is useful to relate back for purposes of calculation of liability, however, does not mean that it is useful to relate back for purposes of the statute of

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(Cont'd)

which this approach has been adopted. His assertion that the Seventh Circuit adopted this approach in *Trustees of Iron Workers Local 473 Pension Trust v. Allied Prods. Corp.,* 872 F.2d 208 (7th Cir.), *cert. denied,* 493 U.S. 847 (1989), is erroneous. That case says nothing about when the limitations period for withdrawal liability actions begins to run. Our statement to the contrary in *Brentwood Financial Corp. v. Western Conference of Teamsters Pension Trust Fund,* 902 F.2d 1456, 1459 (9th Cir. 1990), was incorrect. *See Central States, Southeast and Southwest Areas Pension Fund v. Navco,* 3 F.3d 167,170-71 (7th Cir. 1993), *cert. denied* 114 S.Ct. 1062 (1994).

limitations. Limitations run from "the date on which the cause of action arose." 29 U.S.C. § 1451(f)(1).

We conclude, therefore, that the limitations period of 1451(f) begins to run from the date on which the conditions for complete withdrawal specified in § 1383(b)(2) have been met—in this case, the Spring of 1985. Because the Trustees' action was initiated within six years of the Company's resumption of covered work, their action is timely and the district court erred in dismissing it.

We recognize that our approach differs from that taken by the D.C. Circuit. In *Joyce,* that Circuit concluded that the limitations period does not begin to run until the plan makes a demand upon the employer for withdrawal liability payments and the employer refuses that demand.[5] *Joyce,* 871 F.2d at 1124; *see also ILGWU Nat'l Retirement Fund v. Smart Modes of Cal., Inc.,* 735 F.Supp. 103,106 (S.D.N.Y. 1990) (adopting *Joyce* approach in § 1383(a) withdrawal liability action). In our view, that approach improperly places the running of the limitations period in the control of the plaintiff.

In deciding that the limitations period does not begin to run until a demand for payment goes unmet, the District of Columbia Circuit was influenced by the difficulty of determining when an employer had "permanently" ceased to have an obligation to contribute or "permanently" ceased all covered operations, within the meaning of § 1383(a). *Joyce,* 871 F.2d at 1123-24. Whatever the difficulties might be under that subsection, we conclude that the construction industry provisions of § 1383(b)

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5. The District of Columbia Circuit's approach would not aid Thibodo, of course, because it selects a date even later than the one we choose.

do not lead to debilitating uncertainty concerning whether an employer has completely withdrawn. Determining whether an employer continues to perform work of the type for which contributions were required, or resumes such work within 5 years is relatively straightforward. *See* 29 U.S.C. § 1383(b)(2)(B).[6] We see no reason, therefore, to choose a date of limitations that is in the control of the plaintiff and, theoretically at least, might not be triggered for many years.[7] We also consider our rule to involve a more natural construction of § 1451(f), which sets the limitation as "6 years after the date on which the cause of action arose, or 3 years after the earliest date on which the plaintiff acquired or should have acquired knowledge of the existence of such cause of action." There is little reason for the second clause if the cause of action does not come into existence until demand for payment is made and refused.

For these reasons, we decline to adopt the D.C. Circuit's approach—at least with respect to § 1383(b) withdrawals and hold that for actions to collect withdrawal liability incurred under 29 U.S.C. § 1383(b), the limitations period found in 29 U.S.C. § 1451(f) begins to run on the date that the statutory conditions for withdrawal are met. Because the Trustees brought this action well within six years after that date, it is not time-barred.

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6. We do not decide whether the potential difficulties of determining when an employer has "permanently" ceased covered operations under § 1383(a) warrants adoption of the D.C. Circuit's approach in suits seeking recovery of withdrawal liability incurred under that section.

7. The District of Columbia Circuit opined that there were several incentives for plan sponsors to act promptly in demanding payment of withdrawal liability. *Joyce*, 871 F.2d at 1126-27. There may be, but control still remains with the plaintiff.

Appendix B

No. 93-55079 REVERSED and REMANDED.

No. 93-55080 DISMISSED.

Appendix B

JUDGMENT

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NOS. 93-55079 & 93-55080
CT/AG#: CV-89-03719-JMI (GHK)

BOARD OF TRUSTEES OF THE CONSTRUCTION LABORERS PENSION TRUST FOR SOUTHERN CALIFORNIA

Plaintiff/Appellant-Cross-Appellee

v.

RUSSELL L. THIBODO; GARY R. THOBODO; THIBODO CONSTRUCTION CO., INC.; DRAINAGE CONSTRUCTION CO.

Defendants/Appellees-Cross-Appellants

APPEAL FROM the United States District Court for the Central District of California, Los Angeles.

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Central District of California, Los Angeles and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is REVERSED and REMANDED. The appeal from the District Court's denial of attorneys' fees is DISMISSED as moot. Costs taxed.

Appendix B

Filed and entered September 12, 1994.

[stamped]

FILED
CLERK, U.S. DISTRICT COURT
NOV 10 1994
CENTRAL DISTRICT OF CALIFORNIA
BY DEPUTY

LODGED
NOV 9 1994
CLERK, U.S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
BY DEPUTY

ENTERED CLERK, U.S. DISTRICT COURT
NOV 17 1994
CENTRAL DISTRICT OF CALIFORNIA
BY DEPUTY

APPENDIX C — UNITED STATES DISTRICT COURT ORDER DISMISSING PLAINTIFF'S ACTION FILED AUGUST 24, 1992

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

CV-89-3719-JMI (GHKx)

BOARD OF TRUSTEES OF THE CONSTRUCTION LABORERS PENSION TRUST FOR SOUTHERN CALIFORNIA,

Plaintiff,

v.

RUSSELL L. THIBIDO and THIBIDO CONSTRUCTION COMPANY, INC.,

Defendants.

ORDER DENYING PLAINTIFF'S MOTION TO ENFORCE ARBITRATION AWARD

ORDER RENDERING MOOT DEFENDANTS' MOTION FOR ORDER REOPENING DISCOVERY, CONTINUING PRE-TRIAL CONFERENCE AND TRIAL DATES AND FOR LEAVE TO AMEND ANSWER

IT IS HEREBY ORDERED:

1. The Court HEREBY DENIES the BOARD OF TRUSTEES OF THE CONSTRUCTION LABORERS

Appendix C

PENSION TRUST FOR SOUTHERN CALIFORNIA'S [hereinafter "Plaintiff"] motion to enforce the arbitration award.

2. The Court has jurisdiction over the subject matter in this withdrawal liability dispute under the Employee Retirement Income Security Act of 1974 [hereinafter "ERISA"], 29 U.S.C. §§ 1001 *et seq.*, as amended by the Multiemployer Pension Plan Amendments Act of 1980 [hereinafter "MPPAA"], 29 U.S.C. § 1381-1461. The Court has jurisdiction to enforce, vacate, or modify an arbitration award under 29 U.S.C. § 1401(b)(2).

3. On June 20, 1989, Plaintiff filed a complaint to collect withdrawal liability in the amount of $163,591.00 allegedly owed by Defendants under the MPPAA.

4. On August 7, 1990, pursuant to a stipulation of the parties, the Court DISMISSED WITHOUT PREJUDICE Defendants GARY R. THIBODO, G.R. THIBIDO CONSTRUCTION COMPANY, INC., and DRAINAGE CONSTRUCTION CO., INC. from the above-named action. Stipulation and Order re Dismissal of Defendants, etc., at 1-2 (filed Aug. 7, 1990). RUSSELL L. THIBIDO [hereinafter "THIBIDO"] and THIBODO CONSTRUCTION COMPANY, INC. [hereinafter "THIBIDO CONSTRUCTION"] are the remaining Defendants in this action.

5. THE CONSTRUCTION LABORERS PENSION TRUST FOR SOUTHERN CALIFORNIA is the Plan sponsor of the CONSTRUCTION LABORERS PENSION PLAN [hereinafter the "Plan"]. The Plan is a multiemployer pension Plan primarily covering employees in the building and construction trades. THIBODO CONSTRUCTION is an Employer who previously contributed to the Plan from 1976 to

1981. THIBIDO, is and at all times since 1982, has been the sole stockholder of THIBODO CONSTRUCTION. In 1985, THIBIDO resumed covered work within the jurisdiction of the Plan.

6. In January of 1983, THIBIDO notified the Union by letter that he intended to terminate its collective bargaining agreement with the Union as of June 15, 1983. This date, June 15, 1983, was the date the second collective bargaining agreement between THIBIDO and the Union expired; both agreements required contributions to the Plan.

7. On October 1, 1990, the Court approved a stipulation of the parties to stay the above-named action pending arbitration on the following two issues: (1) "[w]hether the plan correctly determined THIBIDO CONSTRUCTION COMPANY completely withdrew from the plan in 1983" and (2) "[w]hether RUSSELL THIBIDO is individually liable for the withdrawal liability of THIBIDO CONSTRUCTION COMPANY[.]" The parties further stipulated that Defendants maintain their "right to assert in this Court that plaintiff's claim is barred by the doctrines of laches or estoppel." Stipulation and Order re Stay of Proceedings Pending Arbitration (filed Oct. 1, 1990) at 2.

8. On November 20, 1991, Arbitrator Henry C. Todd rendered his award. The Arbitrator determined that the termination of the bargaining agreement between the parties was the date THIBIDO CONSTRUCTION withdrew from the Plan, which is June 15, 1983. Arbitrator Henry C. Todd's Opinion and Award attached to Notice of Lodging Copy of Arbitration Opinion and Award (filed Dec. 2, 1991), at 5. The Arbitrator decided that THIBIDO CONSTRUCTION completely withdrew from the Plan in 1983, that THIBIDO is individually liable for the

withdrawal liability of THIBIDO CONSTRUCTION, and that withdrawal liability shall bear legal interest from June 15, 1983. *Id.* at 10. The Arbitrator ordered that the costs of the arbitration be borne by Defendants, and that no party be awarded attorneys' fees.

9. The Court HEREBY ADOPTS the Arbitrator's factual findings and legal conclusions. Under the MPPAA, there is a statutory presumption that the Arbitrator's findings of fact are correct. This presumption is rebuttable only by "a clear preponderance of the evidence," which Defendants have failed to do. *See* 29 U.S.C. § 1401(c). The Arbitrator's legal conclusions are reviewable *de novo. Western Conference of Teamsters Pension Trust Fund v. Thompson Bldg. Materials. Inc.* 749 F.2d 1396, 1405-06 (9th Cir. 1984), *cert. denied,* 471 U.S. 1054 (1985).

10. There are three issues Defendants, by stipulation, reserved for hearing by this Court: (1) whether this action is barred by the applicable statute of limitations, (2) whether this action is barred by laches, (3) whether Plaintiff is estopped from collecting withdrawal liability.

11. The statute of limitations governing this action to collect withdrawal liability is codified at 29 U.S.C. § 1451(f). An action to collect withdrawal liability must be brought within the *later* of: (1) six years after the date on which the cause of action arose, or (2) three years after the plaintiff knew or should have known of the existence of the claim. 29 U.S.C. § 1451(f).

12. The Ninth Circuit has not ruled on when the six-year limitations period begins to run in a withdrawal liability suit. In ***Brentwood Fin. Corp. v. Western Conference of Teamsters***

Pension Trust Fund, 902 F.2d 1456 (9th Cir. 1990), the Ninth Circuit noted that the courts have split on this issue. Indeed, some courts have held that the statute of limitations period begins to run on the date of complete withdrawal. *See, e.g., Trustees of Iron Workers Local 473 Pension Trust v. Allied Prods. Corp.,* 872 F.2d 208, 214 (7th Cir.), *cert. denied,* 493 U.S. 847 (1989). Other courts have held that the limitations period begins to run from the time an Employer first fails to make a timely payment demanded by a Plan. *See, e.g., Joyce v. Clyde Sandoz Masonry,* 871 F.2d 1119, 1124 (D.C. Cir.), *cert. denied,* 493 U.S. 918 (1989).

13. Defendants do not contest that the six year statute of limitations period is applicable. Using the complete-withdrawal theory, Defendants contend that the June 15, 1983 is, as the Arbitrator decided, when Defendant Employer completely withdrew from the Plan, and because Plaintiff's action was filed on June 20, 1989, it is five days late and thus barred by the statute of limitations. Pursuant to the applicable law and the confusing concepts of when a complete withdrawal occurs and the date of complete withdrawal, the Court agrees with Defendants.

14. In the building and construction industry, a complete withdrawal occurs, if —

> (A) an employer ceases to have an obligation to contribute under the plan, and
>
> (B) the employer —
>
> > (i) continues to perform work in the jurisdiction of the collective bargaining agreement of the type for which contributions were previously required, or

> (ii) resumes such work within 5 years after the date on which the obligation to contribute under the plan ceases, and does not renew the obligation at the time of the resumption.

29 U.S.C. § 1383(b)(2).

The "date of complete withdrawal," however, is determined under another provision of ERISA, 29 U.S.C. § 1383(e). The latter provision provides that "the date of complete withdrawal is the date of the cessation of the obligation to contribute or the cessation of covered operation." *Id.* This Court concludes that, as the Arbitrator decided, complete withdrawal occurred on June 15, 1983.

15. Because this action is barred by the applicable statute of limitations, the Court need not address the merits of Defendant's laches argument or constitutional objections.

16. Defendants' motion for an order re-opening discovery, continuing the Pre-trial Conference and Trial dates, and granting Defendants' leave to amend the Answer are HEREBY MOOT.

THEREFORE, the Court ENTERS JUDGMENT in favor of Defendants and against Plaintiff.

IT IS SO ORDERED.

DATED: 24 August 1992

Appendix C

s/ James M. Ideman
JAMES M. IDEMAN
United States District Judge

APPENDIX D — JOINT STATUS REPORT CONTAINING STIPULATION OF FACTS BETWEEN THE PARTIES ARBITRATION FILED FEBRUARY 21, 1992

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Attorneys for Defendants
RUSSELL L. THIBODO and
THIBODO CONSTRUCTION CO., INC.

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

CASE NO. 89-3719 JMI (GHKx)

BOARD OF TRUSTEES OF THE CONSTRUCTION LABORERS PENSION TRUST FOR SOUTHERN CALIFORNIA,

Plaintiff,

Appendix D

vs.

RUSSELL L. THIBODO, et al.,

Defendants.

JOINT STATUS REPORT

Date: March 2, 1992
Time: 10:00 a.m.
Courtroom: 2

Pursuant to Local Rule 6.4.2 and the Court's order of January 7, 1992, the parties submit this Joint Status Report:

INTRODUCTION

On June 20, 1989 plaintiff filed this lawsuit against Russell L. Thibodo, Gary R. Thibodo, Thibodo Construction Co., Inc., G.R. Thibodo Construction Co., Inc. and Drainage Construction Co., Inc. to collect withdrawal liability payments due under the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA") of the Employee Retirement Income Security Act of 1974 ("ERISA"). Gary R. Thibodo, G.R. Thibodo Construction Co., Inc. and Drainage Construction Co., Inc. were voluntarily dismissed from this action; and on October 1, 1990, pursuant to a stipulation between the parties, the Court stayed this action in order for the parties to arbitrate the following issues: (1) whether the plan correctly determined Thibodo Construction Company completely withdrew from the plan in 1983; and (2) whether Russell Thibodo is individually liable for the withdrawal liability of Thibodo Construction Company. (Under the MPPAA, any dispute regarding the determination of withdrawal liability is

initially to be referred to arbitration. *Teamsters Pension Trust Fund v. Allyn Transportation Co.*, 832 F.2d 502 (9th Cir. 1987).) The stipulation between the parties provided that the stipulation would not be construed as a waiver of the defendants' right to assert before this Court that plaintiff's claims were barred by laches or estoppel.

Subsequently, the parties jointly selected Henry C. Todd, Esq. as the arbitrator. On November 21, 1991 the arbitrator issued an Opinion and Award ("Award") finding that the plan correctly determined that Thibodo Construction Co., Inc., completely withdrew from the plan in 1983 and that Russell L. Thibodo is individually liable for the withdrawal liability of Thibodo Construction Co., Inc. The arbitrator ordered that the award should bear interest from June 15, 1983 and ordered the costs of the arbitration to be borne by Thibodo Construction Co., Inc., and Russell L. Thibodo. Each party was ordered to hear its own attorneys' fees for the arbitration.

1. JURISDICTION

This Court has jurisdiction over the subject matter of this action under 29 U.S.C. § 1451, as this is an action to collect withdrawal liability allegedly owing under the MPPAA. The Court has previously stayed this matter upon stipulation between the parties while the parties completed arbitration. On November 20, 1991, the arbitrator rendered his Opinion and Award and the Court has jurisdiction to enforce, vacate or modify that award under 29 U.S.C. § 1401(b)(2).

2. FACTUAL AND LEGAL BASES OF THE CLAIMS

(The following facts in ¶¶ 1-32 hereof are from the

Appendix D

Stipulated Statement of Facts submitted by the parties to the arbitrator. The Exhibits referred to were also submitted to the arbitrator.)

1. This is a withdrawal liability dispute under the Employee Retirement Income Security Act of 1974 ("ERISA") as amended by the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA").

2. The parties have stipulated to arbitrate this dispute before the American Arbitration Association ("AAA") under the AAA Multiemployer Pension Plan Arbitration Rules for withdrawal Liability Disputes. The parties have stipulated to Henry C. Todd, Esq. as the arbitrator.

3. The Construction Laborers Pension Trust for Southern California is the plan sponsor of the Construction Laborers Pension Plan (the "plan").

4. The plan is a multiemployer pension plan primarily covering employees in the building and construction industry.

5. Thibodo Construction Co., Inc. ("Thibodo") is an employer that previously contributed to the plan in 1976-81.

6. Russell Thibodo is and at all times since 1982 has been the sole stockholder of Thibodo.

7. In 1976, Thibodo signed a collective bargaining agreement with the Southern California District Council of Laborers (the "union") which required, among other things, that Thibodo contribute to the plan for pensions for Thibodo's laborer employees. In 1980, Thibodo executed a second collective

bargaining agreement with the union also requiring contributions to the plan. The latter agreement expired on June 15, 1983.

8. In January of 1983, Thibodo notified the union by letter that Thibodo intended to terminate its collective bargaining agreement with the union as of June 15, 1983. (January 10, 1983 Letter to Laborers Local 783 from Richard M. Freeman, Esq. (Exhibit "A")) In this letter, Thibodo offered to meet and confer with the union for purpose of negotiating a new collective bargaining agreement.

9. After Thibodo's collective bargaining agreement expired, in July 1983, the union's attorneys wrote to Thibodo's attorneys and offered to negotiate a new collective bargaining agreement. (July 21, 1983 letter from Alexander B. Cvitan, Esq. to Richard M. Freeman, Esq. (Exhibit "B")) Thibodo's attorneys responded to this letter that it had been over two years since Thibodo had done any work within the jurisdiction of the union, that Thibodo did not employ any members of the union, that the agreement between Thibodo and the union had been a prehire agreement that had been canceled as of June 15, 1983, that a collective bargaining agreement relationship between Thibodo and the union no longer existed, and that negotiations for a new agreement were no longer necessary or appropriate. (August 1, 1983 letter from Richard M. Freeman, Esq. to Alexander B. Cvitan, Esq. (Exhibit "C"))

10. Thibodo contends that its obligation to contribute to the plan ceased on June 15, 1983. The plan contends that, effective August 1, 1983, Thibodo ceased to have any further obligation under applicable labor management relations law to contribute to the plan.

Appendix D

11. By letter dated February 13, 1984, the plan notified Thibodo that the plan records indicated that Thibodo had not contributed to the plan since August of 1981 and that because Thibodo had not signed a renewal of a collective bargaining agreement obligating Thibodo to contribute to the plan that the plan had concluded that Thibodo had chosen to withdraw from the plan. (February 13, 1984 letter from Dan O'Connell to Thibodo hereafter, "the 1984 withdrawal liability assessment" (Exhibit "D")) In this letter, the plan notified Thibodo that the plan had calculated that Thibodo had a withdrawal liability of $140,143.30, payable in a lump sum or 48 monthly installments commencing on April 13, 1984.

12. After receipt of the 1984 withdrawal liability assessment, Thibodo's attorneys contacted the plan, advised the plan that Thibodo anticipated making a formal request for plan review and requested that the plan voluntarily refrain from declaring a default or accelerating Thibodo's withdrawal liability pending plan review, arbitration or other procedures by Thibodo. (March 26, 1984 letter from Richard M. Freeman, Esq. to Dan O'Connell (Exhibit "E")) This letter indicated that this would be without prejudice to the plan's right to claim interest at the conclusion of the review process.

13. By letter dated April 25, 1934, Thibodo made a request for the plan to review the 1984 withdrawal liability assessment. (April 25, 1984 letter to Dan O ' Connell from Richard M. Freeman, Esq. (Exhibit "F")) In this letter, Thibodo requested review of the following matters: (1) whether Thibodo had effected a withdrawal from the plan and when the withdrawal had occurred; (2) the rate of return on the plan's investment assumptions; (3) the statistical samples utilized by the plan; and (4) any amendments or actions by the plan affecting the

underfunding of the plan. In the current arbitration, Thibodo has raised no issue with respect to the latter three issues. The letter also noted that as discovery continued by the Company, the Company might make additional requests for review.

14. Thibodo made no payment with respect to the 1984 withdrawal liability assessment and the plan agreed to refrain from declaring Thibodo in default while the plan reviewed Thibodo ' s request for plan review. (May 18, 1984 letter to Dan O'Connell from Albert T. Harutunian, Esq. (Exhibit "G"); May 22, 1984 letter from Dan O'Connell to Albert T. Harutunian, Esq. (Exhibit "H"); May 26, 1984 letter to Albert T. Harutunian, Esq. from John S. Miller, Jr., Esq. (Exhibit "I"); June 29, 1984 letter to John S. Miller, Jr., Esq. from Albert T. Harutunian, Esq. (Exhibit "J"); July 6, 1984 letter to John S. Miller, Jr. from Albert T. Harutunian, Esq. (Exhibit "K"); July 26, 1984 letter to John S. Miller, Jr. from Albert T. Harutunian, Esq. (Exhibit "L"); August 27, 1984 letter to John S. Miller, Jr., Esq. from Albert T. Harutunian, Esq. (Exhibit "M"))

15. When Thibodo did not receive a response to its request for plan review by August 27, 1984, on August 27, 1984, Thibodo wrote to the plan that Thibodo was initiating arbitration. (August 27, 1984 letter to John S. Miller, Jr. from Albert T. Harutunian, Esq. (Exhibit "M"))

16. In June 1984, an auditor from the Laborers Collection Office audited Thibodo's records for the period January 1980 through December 1983, and found no evidence that Thibodo owed any additional contributions. By letter dated July 11, 1984, Thibodo was notified by the Collection Office of the results of the audit. (July 11, 1984 letter to Thibodo from Ed Tant, Field Auditor (Exhibit "N")) Based upon the absence of any evidence

that Thibodo had directly employed any laborers after the collective bargaining agreement had expired in June 1983, Dan O'Connell, the plan's pension withdrawal liability coordinator, told Thibodo that the plan would set aside the 1984 withdrawal liability assessment, but that if Thibodo resumed hiring laborers again, Thibodo would be liable for withdrawal liability. (O'Connell Deposition pp. 44-47).

17. On October 18, 1984, attorneys for Thibodo wrote the plan and stated that, in light of the fact that the plan had not yet responded to Thibodo's request for review, Thibodo was amending its request to have the plan also review the timeliness of the assertion of the withdrawal liability claim. Thibodo also stated that it was initiating arbitration on this issue. (October 18, 1984 letter from Al Harutunian, Esq. to John S. Miller, Esq. (Exhibit "O"))

18. On December 11, 1984, the plan passed a resolution pertaining to withdrawal liability arbitration procedures. (Resolution of the Board of Trustees of the Construction Laborers Pension Trust for Southern California, ¶8 (Exhibit "P"))

19. In the spring of 1985, Thibodo resumed covered work within the jurisdiction of the plan on projects for the Riverside County Flood Control District and the Yucaipa Valley Water District. The certified payrolls for these projects show that on both projects Thibodo directly employed laborers. (Certified Payrolls)

20. Upon information that Thibodo was again directly employing laborers within the jurisdiction of the plan, on July 10, 1985, the plan notified Thibodo by letter that the plan was reinstating Thibodo's withdrawal liability. (July 10, 1985 letter to

Thibodo from Dan O'Connell hereinafter referred to as "the 1985 withdrawal liability assessment" (Exhibit "Q")) This letter informed Thibodo that Thibodo had a withdrawal liability of $140,143.30, payable as before in a lump sum or in 48 monthly installments commencing by September 9, 1985.

21. After receipt of the 1985 withdrawal liability assessment, Thibodo contacted the plan, asserted that the assessment was not timely and that the plan had waived the right to collect withdrawal liability. The letter stated that the plan had never responded to Thibodo's request for review made on April 25, 1984 and stated Thibodo was never provided with any documents Thibodo requested and that Thibodo had been prejudiced by the delay and inaction of the plan. Thibodo again requested review of all the issues raised in its April 25 letter. (August 15, 1985 letter to Dan O'Connell from Albert T. Harutunian, Esq. (Exhibit "R")) In this letter, Thibodo requested the plan voluntarily agree to refrain from declaring Thibodo in default while the plan reviewed the assessment.

22. On August 21, 1985, the plan responded to Thibodo's request for plan review and stated that the plan had not pursued the 1984 withdrawal liability assessment because no evidence had been found in the 1984 audit that Thibodo was any longer directly hiring laborers and that based upon new evidence that Thibodo was again employing laborers, the plan had reinstated Thibodo's withdrawal liability. (August 21, 1985 to Albert T. Harutunian, Esq. from Dan O'Connell (Exhibit "S"))

23. Thibodo made no payment with respect to the 1985 withdrawal liability assessment and by letter dated September 12, 1985, the plan notified Thibodo that Thibodo was delinquent in its payments and that if Thibodo did not cure the delinquency

within 60 days, Thibodo would be in default and the plan could declare Thibodo's entire withdrawal liability immediately due. (September 12, 1985 letter to Thibodo from Dan O'Connell (Exhibit "T"))

24. Notwithstanding the September 12, 1985 letter, it was subsequently agreed that the plan would not declare Thibodo in default for nonpayment of withdrawal liability without further notice from the plan. (October 10, 1985 letter to John S. Miller, Jr., Esq. from Albert T. Harutunian, Esq. (Exhibit "U"); and November 15, 1985 letter to Albert T. Harutunian, Esq. from John S. Miller, Jr., Esq. (Exhibit "V"))

25. From November 15, 1985 to April 6, 1989, there was no communication between Thibodo and the plan.

26. In April 1989, the plan notified Thibodo that the plan was terminating the agreement with respect to Thibodo's withdrawal liability and that Thibodo must commence payment of withdrawal liability within 60 days. (April 6, 1989 letter to Albert T. Harutunian, Esq. from Herbert J. Klein, Esq. (Exhibit "W"))

27. On June 20, 1989, the plan filed suit in the United States District for the Central District of California against Thibodo, Russell Thibodo, Gary Thibodo, G.R. Thibodo Construction Co, Inc. and Drainage Construction Co., Inc. to collect withdrawal liability. Each of the defendants was alleged to be jointly and severally liable for the withdrawal liability of Thibodo under ERISA controlled group principles. In August 1990, Gary Thibodo, G.R. Thibodo Construction Co. and Drainage Construction were dismissed from the lawsuit based upon the absence of evidence of a common control group. Subsequently,

on October 1, 1990, the court agreed to stay proceedings upon a stipulation between the plan and the remaining defendants, Thibodo and Russell Thibodo, that defendants would initiate arbitration of the dispute before the AAA. (Stipulation and order re Stay of Proceedings Pending Arbitration (Exhibit "X"))

28. The stipulation between the parties recites that the following issues are to be arbitrated:

a. whether the plan correctly determined Thibodo Construction completely withdrew from the plan in 1983;

b. whether Russell Thibodo is individually liable for the withdrawal liability of Thibodo Construction Company.

29. The parties further stipulated that nothing in the stipulation should be construed as a waiver of the rights of Thibodo and Russell Thibodo to assert in court that the plain's withdrawal liability claim was barred by laches or estoppel.

30. Thibodo no longer disputes that after June 1983, it directly employed laborers within the jurisdiction of the plan to perform work of the type for which Thibodo was required to contribute to the plan when Thibodo had a collective bargaining agreement with the union. (Thibodo's Response to Interrogatory No. 13 and Deposition of Gary Thibodo, pp. 34-35. See also the contracts between Thibodo and the Irvine Ranch Water District in 1985 and 1986, and Certified Payrolls for the Riverside Flood Control District and Yucaipa Water District projects.)

31. In 1979, Russell Thibodo acquired a D-9 tractor plus

various pieces of construction equipment. (Schedule C-1, 1980 Federal Tax Return, Russell and Margaret Thibodo.) Mr. Thibodo depreciated this equipment on his personal tax returns each year until 1986. Mr. Thibodo also claimed expenses for legal and professional services for his equipment rental activities on his personal tax returns. In 1983, Mr. Thibodo obtained a Peterbilt truck for $21,850, which he also depreciated on his personal tax returns. In 1987, Mr. Thibodo had gross receipts of $22,936 for consulting services. (Schedule C, 1987 Federal Tax Return for Russell Thibodo.) In 1988, Mr. Thibodo had receipts of $45,000 from his consulting services. (Schedule C, 1988 Federal Tax Return for Russell Thibodo.)

32. Thibodo has made no withdrawal liability payments to the plan.

33. At the arbitration, the following additional exhibits were received in evidence:

(1) The Financial Statements for Thibodo Construction Company for the years ending December 31, 1985 and 1984 (Exhibit No. 1);

(2) Excerpts from Mr. Thibodo's tax returns for 1980 (Exhibit No. 2); 1981 (Exhibit No. 3); 1982 (Exhibit No. 4); 1985 (Exhibit No. 5); 1986 (Exhibit No. 6); and 1987 (Exhibit No. 7);

(3) Notice of Deposition of Pederson and Lecours and Deposition Subpoena (Exhibit No. 8);

(4) Miscellaneous Correspondence (Exhibit No. 9);

(5) Responses of Russell L. Thibodo to plaintiff's first set of interrogatories (Exhibit No. 10);

(6) Withdrawal Liability Calculations (Exhibit t No. 11);

(7) Transcript of July 31, 1991 Deposition of Russell Thibodo (Exhibit No. 12) and Russell Thibodo's changes to Deposition Transcript (Exhibit 12(a));

(8) January 30, 1990 Deposition of Russell Thibodo (Exhibit 12(b));

(9) Deposition of Dan O'Connell (Exhibit No. 13);

(10) June 11, 1991 notice from the IRS re request for copies of Mr. Thibodo's 1983 and 1984 tax returns (Exhibit No. 14).

34. Russell L. Thibodo asserts that enforcement of any withdrawal liability against him personally is unconstitutional. Defendants assert these claims are barred by laches and estoppel. Defendants intend to introduce evidence on these issues which was not introduced at the arbitration.

3. PROPOSED DATES

Proposed date by which all requests for discovery are to be made: Discovery has been completed.

Proposed date by which all compliance with discovery is to be made: Discovery has been completed.

Appendix D

Proposed motion cutoff date (for notice of motion): April 3, 1992. Plaintiff anticipates to bring a motion for summary judgment to enforce the arbitrator's award.

Proposed pretrial conference date: mid to late June 1992.

Proposed trial date: September 1992. Plaintiff's counsel has other trials in July and August 1992.

4. PROCEDURAL OR EVIDENTIARY PROBLEMS

None.

5. PROSPECTS OF SETTLEMENT

Settlement is unlikely.

6. ESTIMATED TRIAL TIME

Plaintiff estimates its case in chief will take one-half day. Defendants estimate their case will take one and one-half days.

7. STIPULATION TO A MAGISTRATE

The parties are unwilling to stipulate to a magistrate for all proceedings.

8. NON-JURY TRIAL

This matter is to be tried before the Court.

9. ATTORNEYS WHO WILL TRY THE CASE

Appendix D

The name of plaintiff's attorney who will try this case is Herbert Jay Klein. The names of defendants' attorneys who will try this case are Richard M. Freeman and David B. Chidlaw.

Dated: February 21, 1992

COX, CASTLE & NICHOLSON
John S. Miller, Jr.
Herbert Jay Klein

By: s/ Herbert Jay Klein
HERBERT JAY KLEIN

Attorneys for Plaintiff
BOARD OF TRUSTEES OF THE
CONSTRUCTION LABORERS PENSION
TRUST FOR SOUTHERN CALIFORNIA

Dated: February 20, 1992

SHEPPARD, MULLIN, RICHTER & HAMPTON

By: s/ David B. Chidlaw
RICHARD M. FREEMAN
DAVID B. CHIDLAW

Attorneys for Defendants
RUSSELL L. THIBIDO and
THIBODO CONSTRUCTION CO., INC.

APPENDIX E — NOTICE OF LODGING COPY OF ARBITRATION OPINION AND AWARD FILED NOVEMBER 31, 1991

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Attorneys for Plaintiff

UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

CASE NO. 89-3719 JMI (GHKx)

BOARD OF TRUSTEES OF THE CONSTRUCTION LABORERS PENSION TRUST FOR SOUTHERN CALIFORNIA,

Plaintiff,

vs.

RUSSELL L. THIBODO, et al.,

Defendants.

Appendix E

NOTICE OF LODGING COPY OF ARBITRATION OPINION AND AWARD

The Court has retained jurisdiction over this matter pending completion of the withdrawal liability arbitration and instructed the parties to notify the Court upon the completion of the arbitration.

On November 20, 1991, the arbitrator, Henry C. Todd, Esq., rendered his Opinion and Award, a copy of which plaintiff now lodges with the Court.

Dated: November 27, 1991

COX, CASTLE & NICHOLSON
John S. Miller, Jr.
Herbert Jay Klein

By: s/ Herbert Jay Klein
Attorneys for Plaintiff

Appendix E

AMERICAN ARBITRATION ASSOCIATION
(213) 383-6516 TELECOPIER (213) 386-2251
ARBITRATION • MEDIATION • MINI-TRIAL •
ELECTIONS • TRAINING

November 25, 1991
72 621 0009 90 MEPPA
Thibodo Construction Company, Inc.,
and Russell Thibodo
-and-
The Construction Laborers' Pension
Trust for Southern California
Grievance: Withdrawal Liability

Dick Freeman &
David B. Chidlaw, Attorneys
for Thibodo Construction Company,
Inc., and Russell Thibodo
Sheppard Mullin Richter & Hampton
501 W. Broadway, 19th Flr.
San Diego, CA 92101

Herbert Jay Klein, Attorney
for The Construction Laborers' Pension
Trust for Southern California
Cox Castle & Nicholson
2049 Century Park East, 28th Flr.
Los Angeles, CA 90067

Dear Parties:

In accordance with Section 36 of the Multiemployer Pension Plan Arbitration Rules for Withdrawal Liability Disputes of the

Appendix E

Association, and by direction of the Arbitrator, we are transmitting to each party a duly signed copy of the Award and Opinion in the above captioned matter.

Sincerely,

s/ Jean Willauer
Jean Willauer
Sr. Administrator
/mr

Encl.

cc: Henry C. Todd, Esq.

Appendix E

HENRY C. TODD
Arbitrator

369 Pine Street, Suite 300
San Francisco, CA 94104
Telephone No. (415) 362-0520

BEFORE THE AMERICAN ARBITRATION ASSOCIATION

Case No. 72 621 0009 MEPPA

HEARING HELD
August 21, 1991

In the Matter of the Withdrawal Liability Dispute Between

THE BOARD OF TRUSTEES OF THE CONSTRUCTION LABORERS PENSION TRUST FOR SOUTHERN CALIFORNIA,

and

THIBODO CONSTRUCTION CO., INC., a corporation, and RUSSELL L. THIBODO, an individual

OPINION AND AWARD

FACTS

The hearing was held, before the Arbitrator, on the 21st day of August, 1991, at the offices of the American Arbitration Association in Los Angeles, California.

Appendix E

The Board of Trustees of the Construction Laborers Pension Trust for Southern California was represented by Cox, Castle & Nicholson by Herbert J. Klein. The Thibodo Construction Company, Inc., and Russell L. Thibodo were represented by Sheppard, Mullin, Richter & Hampton by Richard M. Freeman.

The parties have stipulated to arbitrate the dispute before the American Arbitration Association under the American Arbitration Association Multiemployer Pension Plan Arbitration Rules for Withdrawal Liability Disputes and stipulated to Henry C. Todd, as the Arbitrator.

The parties stipulated that this is a withdrawal liability dispute under the Employee Retirement Income Security Act of 1974 ("ERISA"), as amended by the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA").

The Construction Laborers Pension Trust for Southern California is the Plan's sponsor of the Construction Laborers Pension Plan. The Plan is a multiemployer pension plan primarily covering employees in the building and construction trades.

Thibodo Construction Company, Inc., is an employer who previously contributed to the Plan from 1976 to 1981. Russell L. Thibodo, is and at all times since 1982, has been the sole stockholder of Thibodo Construction Company, Inc.

In January of 1983, Thibodo notified the Union by letter that Thibodo intended to terminate its collective bargaining agreement with the Union as of June 15, 1983. This date, June 15, 1983, was the date of the expiration of the second collective bargaining agreement between Thibodo and the Union, both of which required contributions to the Plan.

Appendix E

The Arbitrator takes the date of termination of the bargaining arrangement between the parties as the date for the withdrawal from the Plan, which is June 15, 1983.

The correspondence between the parties would indicate that there was an attempt by attorneys for Thibodo to automatically wipe out the termination date of the agreement between the parties.

The failure to have a new written document at any time subsequent to June 15, 1983 did not wipe out the obligation established by the law for the employer to make proper contributions under ERISA and under MPPAA.

There were certain professional courtesies which were extended by attorneys representing the Plan and also Thibodo over a period of some years. These extensions of professional courtesy do not wipe out the obligation of Thibodo to make contributions to the Plan.

On April 25, 1984, a letter to Dan O'Connell from Richard M. Freeman, which is attached as Exhibit "F" to the Stipulated Statement of Facts, requested review as to "whether Thibodo had effected a withdrawal from the Plan and when the withdrawal had occurred". The other requests contained in that letter have not been followed up and will not be considered by the Arbitrator.

There were certain entities who were named in the litigation in the United States Court in a suit filed June 20, 1989 for collection of the withdrawal liability. These additional defendants, besides Thibodo Construction Company, Inc. and Russell L. Thibodo: are Gary R. Thibodo, G. R. Thibodo Construction Company, Inc. and Drainage Construction Company, Inc.

Appendix E

In the allegations of the complaint for collection, all of these defendants were alleged to be jointly and severally liable for the withdrawal liability of Thibodo under "ERISA Controlled Group Principles".

In August of 1990, Gary R. Thibodo, G. R. Thibodo Construction Company, Inc. and Drainage Construction Company, Inc., were dismissed from the lawsuit based upon the absence of evidence of a common controlled group.

On October 1, 1990, the United States District Court for the Central District of California agreed to stay proceedings upon a stipulation between the Plan and the remaining defendants Thibodo and Russell Thibodo that defendants would initiate arbitration of the dispute before the American Arbitrations Association.

The stipulation between the parties recited that the following issues are before the Arbitrator:

1. Whether the Plan correctly determined Thibodo Construction Company, Inc., completely withdrew from the Plan in 1983; and

2. Whether Russell Thibodo is individually liable for the withdrawal liability of Thibodo Construction Company.

It was further stipulated that nothing concerning the stipulation before the Federal District Court should be construed as a waiver of the rights of Thibodo and Russell Thibodo to assert in court that the Plan's withdrawal liability claim was barred by laches or estoppel. No information concerning this was before the Arbitrator and for this reason, the Arbitrator will not rule on these contentions.

Appendix E

It is agreed that after June 1983, Thibodo directly employed laborers with the jurisdiction of the Plan to perform work of the type for which Thibodo was required to contribute to the Plan, when Thibodo had a collective bargaining agreement with the Union.

* * * * * * * * * * * * *

DISCUSSION

The commencement of this litigation occurred immediately after there was a withdrawal finding by the Fund indicating that there was a 1983 withdrawal.

Thibodo had notified the Union that it intended to terminate its collective bargaining agreement with the Union, as of June 15, 1983. This, it would seem, would be the logical date for the withdrawal from the Pension Plan.

The days are no longer with us where an employer can, with impunity, advise either a union or a pension plan that there is going to be a withdrawal as of a particular date without a consideration of other matters which are inalterably connected with the bargaining process.

Rightly or wrongly, the legislative portion of the governments of the United States and the states have taken a position that representation to employees is to be taken at face value and the contracts cannot be terminated without assumption of withdrawal liability.

The elimination of the strike, except in very rare circumstances, has been accompanied by responsibilities to sit down and negotiate promptly and in good faith.

Appendix E

The Arbitrator finds that it is inconceivable that a period of over eight (8) years has gone on since this dispute commenced.

Counsel for Thibodo have raised eloquent argument to avoid personal liability of their client. The fact remains, however, that the umbrella under which Thibodo operated included the rental business concerning equipment. The testimony of Thibodo in his deposition was not compelling or persuasive. The fact that he failed to remember persons who were connected with these transactions, by name, and that no other evidence was presented from any source concerning this, would indicate that the Arbitrator should not be bound to accept his testimony that these transactions were not connected with the construction company.

If Thibodo is accepting a tax benefit from the purchase of this equipment and the leasing of it, then this should be considered to be a part of the business relationship which comes under the umbrella of obligation to pay to the Fund.

Counsel for Thibodo, in their Opposition Brief on page 16 at line 25, used the language as follows: "Thibodo's personal activities should not lead to unlimited personal liability". By determining that he is responsible for a corporation in which he holds the entire stock and over which he at the time of the withdrawal had complete control would not indicate that there was "unlimited personal liability". What is effected by this opinion and decision is that the liability is fixed for Thibodo's corporation and himself to the Fund for 1983.

Thibodo, through the operation of his counsel, has enjoyed freedom of liability for this withdrawal for a period of in excess of eight (8) years. As far back as April 25, 1984, a letter was addressed by Mr. Freeman to Dan O'Connell to request a review

as to "whether Thibodo had effected a withdrawal from the Plan and when the withdrawal had occurred". For the Arbitrator to indicate that the withdrawal had occurred prior to that April 25th date would not seem to be a surprise to Thibodo.

DECISION AND AWARD

It is the decision of the Arbitrator that the Board of Trustees of the Construction Laborers Pension Trust for Southern California correctly determined that Thibodo Construction Company, Inc., completely withdrew from the Plan in 1983 and that Russell L. Thibodo is individually liable for the withdrawal liability of Thibodo Construction Company, Inc., and that therefore, withdrawal liability shall bear legal interest from June 15, 1983.

It is further Ordered that the costs of the arbitration shall be borne by Thibodo Construction Company, Inc., and Russell L. Thibodo. No attorneys fees shall be awarded to the Fund, the Thibodo Construction Company, Inc., or to Russell L. Thibodo, as an individual.

The Arbitrator retains jurisdiction of this entire proceeding for the purpose of carrying out the terms of this Award.

SO ORDERED.

Dated: November 20, 1991

s/ Henry C. Todd
HENRY C. TODD
Arbitrator

Supreme Court
FILED
FEB 22 1995
OFFICE OF THE CLERK

(2)

No. 94-1266

In The

Supreme Court of the United States

October Term, 1994

RUSSELL L. THIBODO, et al.

Petitioners,

vs.

BOARD OF TRUSTEES OF THE CONSTRUCTION LABORERS PENSION TRUST FOR SOUTHERN CALIFORNIA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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LIST OF PARTIES

The parties to the proceedings are:

Petitioners: Russell L. Thibodo, an individual, and Thibodo Construction Company, Inc., a corporation[1]

Respondent: Board of Trustees of the Construction Laborers Pension Trust for Southern California

---

[1] Gary R. Thibodo and Drainage Construction Company were dismissed upon stipulation of the parties in 1990 before this action was dismissed by the district court in 1992. They were not parties to the appeal before the Court of Appeals and have no standing to seek a writ of certiorari from this Court.

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STATUTES INVOLVED

Section 4203 of ERISA [29 U.S.C. § 1383] provides in pertinent part that:

(a) Determinative factors

For purposes of this part, a complete withdrawal from a multiemployer plan occurs when an employer –

(1) permanently ceases to have an obligation to contribute under the plan, or

(2) permanently ceases all covered operations under the plan.

(b) Building and construction industry

(1) Notwithstanding subsection (a) of this section, in the case of an employer that has an obligation to contribute under a plan for work performed in the building and construction industry, a complete withdrawal occurs only as described in paragraph (2), if –

(A) substantially all the employees with respect to whom the employer has an obligation to contribute under the plan perform work in the building and construction industry, and

(B) the plan –

(i) primarily covers employees in the building and construction industry, or

(ii) is amended to provide that this subsection applies to employers described in this paragraph.

(2) A withdrawal occurs under this paragraph if –

> (A) an employer ceases to have an obligation to contribute under the plan, and
>
> (B) the employer –
>
> (i) continues to perform work in the jurisdiction of the collective bargaining agreement of the type for which contributions were previously required, or
>
> (ii) resumes such work within 5 years after the date on which the obligation to contribute under the plan ceases, and does not renew the obligation at the time of the resumption.

Section 4221(b) of ERISA [29 U.S.C. § 1401(b)(2)] provides that:

> (2) Upon completion of the arbitration proceedings in favor of one of the parties, any party thereto may bring an action, no later than 30 days after the issuance of an arbitrator's award, in an appropriate United States district court in accordance with section 4301 to enforce, vacate, or modify the arbitrator's award.

Section 4301(f) of ERISA [29 U.S.C. § 1451(f)] provides that:

> Time limitations
>
> An action under this section [ERISA § 4301] may not be brought after the later of –
>
> (1) 6 years after the date on which the cause of action arose, or
>
> (2) 3 years after the earliest date on which the plaintiff acquired or should have acquired actual knowledge of the existence of such cause of action; except that in the case of fraud or

concealment, such action may be brought not later than 6 years after the date of discovery of the existence of such cause of action.

STATEMENT OF THE CASE

On June 20, 1989, Respondent (the "plan") filed this action in the United States District Court for the Central District of California against Petitioners Thibodo Construction Company, Inc., Russell L. Thibodo, G.R. Thibodo Construction Company, Inc., Drainage Construction Company Co., Inc. and Gary R. Thibodo to collect withdrawal liability. In August 1990, G.R. Thibodo Construction Company, Drainage Construction Company, Inc. and Gary R. Thibodo were dismissed without prejudice from this action upon stipulation of the parties. Subsequently, in September 1990, the parties agreed to stay proceedings in the District Court and to submit to arbitration the following two issues: (1) whether the plan correctly determined that Thibodo Construction Company completely withdrew from the plan in 1983; and (2) whether Russell Thibodo was individually liable for the withdrawal liability of Thibodo Construction Company. In October 1990, the District Court entered an order staying proceedings while the parties arbitrated the foregoing issues.

After a hearing before the arbitrator in August 1991, the arbitrator rendered a decision on November 20, 1991, finding in favor of the plan on both issues. On December 2, 1991, the plan notified the District Court of the arbitrator's award by lodging a copy of the award with the District Court. Subsequently, the District Court, which

had retained jurisdiction of this matter, directed the parties to file a joint status report and set the case for a status conference. In the Joint Status Report which the parties filed on February 21, 1992, the parties jointly proposed a motion cutoff date of April 3, 1992; and the plan indicated in the Joint Status Report that the plan intended to file a motion for summary judgment to enforce the arbitration award. After receipt of the Joint Status Report from the parties, the District Court vacated the Status Conference; and on March 12, 1992, the plan filed a motion to enforce the arbitration award.

When Respondent brought a motion to enforce the arbitration award, Petitioners contended that Respondent's action was barred by the six (6) year statute of limitations under section 4301(f) of ERISA [29 U.S.C. § 1451(f)(1)] and by Respondent's failure to bring an action to enforce the award within thirty (30) days of the arbitrator's award. The District Court held that the courts were split as to when a cause of action to collect withdrawal liability begins to run; that some courts hold, as the Petitioners argued, that the statute of limitations begins to run on the date of a complete withdrawal; and others, that the limitations period begins to run from the time that an employer first fails to make timely payment. The District Court agreed with the Petitioners and held that the Respondent's complaint was barred by the statute of limitations.[2] Respondent unsuccessfully sought

---

[2] The district court did not address petitioners' argument that the plan's claim was barred by the plan's failure to bring an action to enforce the arbitrator's award within thirty days of the arbitrator's award.

reconsideration and appealed the District Court's decision to the Ninth Circuit Court of Appeals.

The Ninth Circuit reversed the District Court's statute of limitations holding, noting that "under the district court's approach, the limitations period was running against the [plan] before the [plan] acquired a cause of action." 34 F.3d at 914, 917. After unsuccessfully seeking a rehearing before the Court of Appeals, Petitioners filed a petition for writ of certiorari with this Court.

REASONS WHY THE COURT SHOULD DENY THE PETITION FOR CERTIORARI.

Petitioners do not raise any conflict among the Circuits, nor do they raise any question of significant special importance that warrants review of the Opinion of the Ninth Circuit Court of Appeals. Indeed, several of the questions that the Petitioners now seek to raise in this Court were not even addressed in the courts below.

A. Petitioners Are Asking The Court to Review Matters That Were Not Addressed In The Courts Below.

Initially, Petitioners ask this Court to review whether it was "an abuse of discretion for the *Court of Appeals* to find that [the plan's] failure to challenge an arbitrator's award and stipulated finding on a timely basis is *excusable neglect*" (Petition for Writ of Certiorari, Question 1). The Court of Appeals made no such finding of excusable neglect, nor was such finding implicit in the Opinion of the Court of Appeals. The Court of Appeals reviewed de

novo the District Court's ruling on when the statute of limitations begins to run in an action to collect withdrawal liability. Thibodo argued that the statute of limitations began to run on the date of complete withdrawal. The plan argued that the statute could not begin to run until a cause of action accrued. The District Court believed there was conflicting opinion as to when a cause of action accrued, ruled in favor of Thibodo. The Ninth Circuit reversed the District Court decision on appeal and noted that Thibodo had been "unable to cite to any federal court opinion which [Thibodo's] approach has been adopted." 34 F.3d at 917 n. 4. The Opinion of the Court of Appeals was based upon an interpretation of law. The Court of Appeals made no finding whether under ERISA a party must bring an action to enforce an arbitrator's award within 30 days of the award or whether the plan's failure to bring such an action in this case was the result of excusable neglect.

Likewise, neither District Court nor the Court of Appeals addressed the Petitioners' second question whether the plan's failure to move to modify the arbitrator's findings as to the date of Thibodo's withdrawal was fatal. Petitioners, citing the District Court's opinion in *Trustees of Amalgamated Insurance Fund v. Sheldon Hall Clothing, Inc.*, 683 F. Supp. 986, 991 (E.D. Pa. 1988), *aff'd*, 862 F.2d 1020 (3rd Cir. 1988) maintain that 29 U.S.C. § 1401(b)(2) requires that a party must challenge an arbitrator's award within thirty days of issuance of the award, or any objections to the award are forever waived. The Third Circuit interpreted § 1401(b)(2) in the *Sheldon Hall Clothing*, as follows:

> The only logical construction of the MPPAA is for § 1401(b)(2)'s 30-day limitation to apply only to actions to modify or vacate the arbitrator's award, while the three or six-year limitation of § 1451(f) applies to actions to confirm the arbitrator's award. . . . *[W]e do not believe that Congress intended that pension plans be required to reduce favorable arbitration awards to judgment within 30 days upon pain of forever being barred from collecting the award.* (emphasis ours)

862 F. 2d at 1023.

The Third Circuit in *Sheldon Hall Clothing*, then went on to hold that actions to enforce an arbitrator's award under the MPPAA are governed by the three to six year limitations period under 29 U.S.C. § 1451(f). *Id.* Respondent is aware of no holding to the contrary.

B. While There Is A Conflict Among The Circuit Courts As To When A Cause of Action To Collect Withdrawal Liability Accrues, Resolution Of That Conflict Would Not Aid The Petitioners In This Case.

The Ninth Circuit differs with the Federal Circuit and the Seventh Circuit as to when the statute of limitations in an action to collect withdrawal liability begins to run. In this case, the Ninth Circuit held that the statute of limitations begins to run on the date on which the conditions for a complete withdrawal have been met. In this case, the Ninth Circuit held this was in 1985 when Thibodo Construction Company resumed covered work. The Federal Circuit holds that the limitations period does

not begin to run until a plan makes a demand for payment and the employer fails to make payment timely. *Joyce v. Clyde Sandoz Masonry*, 871 F.2d 1119 (D.C. Cir.) *cert. denied*, 493 U.S. 918 (1989). The Seventh Circuit, as well as a number of trial courts, have followed the latter position, *see, e.g., Central States, Southeast and Southwest Areas Pension Fund v. Navco*, 3 F.3d 167, 171 (7th Cir.) *cert. denied*, 114 S.Ct. 1062 (1994); *ILGWU Nat'l Retirement Fund v. Smart Modes of Cal., Inc.*, 735 F. Supp. 103, 106 (S.D. N.Y. 1990).

Resolution of this conflict will not, however, change the outcome of this case. Respondent initiated the lawsuit in this case within *both* six (6) years of the accrual of a cause of action in 1985 and Thibodo's failure to timely remit payment after the plan made a demand for payment in 1985.

C. The Petitioners' New Statute of Limitations Argument Is Foreclosed By The Express Unequivocal Language Of ERISA Section 4301(f).

The Petitioners now argue that the plan's lawsuit is barred by the three year statute of limitations under ERISA § 4301(f)(2) [29 U.S.C. § 1451(f)(2)] because the plan failed to file its lawsuit within *three* years after the plan became aware of Thibodo's resumption of covered work. This is a new argument that the Petitioners did not previously raise in the courts below.[3] Petitioners' new

---

[3] All along, Petitioners previously maintained that this action was governed by the six year limitations period under

statute of limitations argument is foreclosed by the language of section 4301(f) of ERISA which provides:

> An action under this section may not be brought after the **later** of –

(1) 6 years after the date on which the cause of action arose, or

(2) 3 after the earliest date on which the plaintiff acquired or should have acquired actual knowledge of the existence of such cause of action (emphasis ours).

ERISA § 4301(f)(1) [29 U.S.C. § 1451(f)(1]). *See,* the District Court's Order ("Defendants do not contest that the six year statute of limitations period is applicable") (Appendix C, page 20a). Because the Petitioners did not raise the three year statute in the courts below, the Court should not consider this new argument. This is not such an exceptional case, nor is there any important recurring issue that warrants departure from the general rule that questions not raised or resolved in the lower courts are not reviewed by the Court. *Duignan v. United States,* 274 U.S. 195, 200, 47 S.Ct. 566, 568, 71 L.Ed. 996 (1927).

CONCLUSION

For the reasons stated the Petitioners' Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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Dated: February 23, 1995